[redacted]

## TABLE OF CONTENTS


Page

TABLE OF AUTHORITIES ..... i

OPINIONS BELOW ..... 1

QUESTION PRESENTED ..... 1

COUNTERSTATEMENT OF THE CASE ..... 2

ARGUMENT IN OPPOSITION TO CERTIORARI ..... 7

**I. Since Congress, Acting Under Its Conceded Authority, Clearly Legislated To Permit the Importation of Metallurgical Chromite and Other "Strategic and Critical" Materials from Rhodesia, the Importation of Chromite Challenged Here Presents No Substantial Question of Law Warranting Decision by this Court.** ..... 9

**II. Moreover, the Court of Appeals Correctly Held that the Judiciary Should Not Intrude into the Intricate and Important Foreign Policy Decisions Made by the Executive in Connection with the Byrd Amendment.** ..... 12

CONCLUSION ..... 16

ADDENDUM A, LEGISLATIVE HISTORY OF THE BYRD AMENDMENT ..... 1a

ADDENDUM B, AFFIDAVIT OF STANLEY L. SOMMERFIELD .. 23a


## TABLE OF AUTHORITIES

CASES:


*Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948) ..... 14

*Clark* v. *Allen*, 331 U.S. 503 (1947) ..... 9

*Edye* v. *Robertson (The Head Money Cases)*, 112 U.S. 580 (1884) ..... 9

Page

*First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966) ..... 11
*Flood* v. *Kuhn*, 407 U.S. 258 (1972) .....11, 12
*Moser* v. *United States*, 341 U.S. 41 (1951) ..... 9
*Nielsen* v. *Secretary of Treasury*, 424 F.2d 833 (D.C. Cir. 1970) ..... 15
*Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918) .... 15
*Pigeon River Co.* v. *Cox*, 291 U.S. 138 (1934) ..... 9
*Sardino* v. *Federal Reserve Bank of New York*, 361 F.2d 106 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966) 15
*Stephens* v. *Cherokee Nation*, 174 U.S. 445 (1899) .... 9
*Toolson* v. *New York Yankees*, 346 U.S. 356 (1953) ... 12
*United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) .....14, 15
*Welch* v. *Kennedy*, 319 F. Supp. 944 (D.D.C. 1970) ... 15
*Whitney* v. *Robertson*, 124 U.S. 190 (1888) .....9, 10

STATUTES, TREATIES AND REGULATIONS:

Executive Order No. 11322, Jan. 5, 1967 ..... 3
No. 11419, July 20, 1968 ..... 3
Legislative Reorganization Act of 1970, § 126, Pub. L. No. 91-510, § 126 (Oct. 23, 1970) ..... 4
Military Procurement Act of 1971, Section 503 (Byrd Amendment), Pub. L. No. 92-156 (Nov. 17, 1971) *passim*
Rhodesian Sanctions Regulations, 31 C.F.R.:
§ 530.518 .....3, 6, 11
§ 530.807 ..... 3
Rhodesian Transaction Regulations, 31 C.F.R. Part 525 (1967) ..... 3
Strategic and Critical Materials Stock Piling Act, 50 U.S.C. §§ 98-98h (1970) .....3, 4, 7, 8, 14
Trading with the Enemy Act, 50 U.S.C. App. § 5 .....8, 15
U.N. Charter .....8, 10, 11, 13
United Nations Participation Act, Section 5, 22 U.S.C. § 287c ..... 3, 4
United Nations Security Council Resolution 232 (Dec. 16, 1966) and 253 (May 29, 1968) ..... 3

Page

LEGISLATIVE HISTORY:

Senate and House Debates on Byrd Amendment, 117 Cong. Rec. (1971) ..... 4, 11

Senate and House Debates on Provisions Repealing or Modifying Byrd Amendment, 118 Cong. Rec. (1972) ..... 7

Senate Debates on Ratification of U.N. Charter, 91 Cong. Rec. (1945) ..... 10

*U.S. Sanctions Against Rhodesia—Chrome, Hearings on S. 1404 Before the Senate Committee on Foreign Relations*, 92d Cong., 1st Sess. (1971) ..... 4

MISCELLANEOUS:

The New York Times, Nov. 18, 1971, p. 13, col. 1 ..... 14

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

---

No. 72-1037

---

CHARLES COLES DIGGS, JR., ET AL., *Petitioners,*

v.

GEORGE P. SHULTZ, Secretary of the Treasury, ET AL., *Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## BRIEF FOR RESPONDENT UNION CARBIDE IN OPPOSITION

---

### OPINIONS BELOW

The decisions of the Court of Appeals and the District Court have not been reported, but are reprinted at Pet. 47a-55a and Pet. 34a-46a, respectively.

### QUESTION PRESENTED

Despite petitioners' efforts to involve this Court in issues of national security and international relations which were conclusively resolved by the Congress and the President under the Byrd Amendment, the only legal questions presented were completely disposed of by the Court of Appeals in accordance with well settled

precedents. Stripped of petitioners' political coloration, the questions presented are:

(1) Where Congress in the Byrd Amendment, after a thorough review of all possible consequences, specifically including inconsistency with preexisting treaty obligations, expressly mandated the importation of metallurgical chromite and other "strategic and critical" materials from Rhodesia (except under circumstances which admittedly do not exist), may the courts set aside the Congressional mandate on the basis of alleged inconsistency with the obligations of a treaty predating the legislation?

(2) Where, by virtue of unchallenged and unchallengeable national security and foreign policy determinations by the Executive, the circumstances which, under the Byrd Amendment, would permit a ban on the importation of metallurgical chromite and other "strategic and critical" materials from Rhodesia do not exist, may the court revise such Executive decisions in order to avoid alleged conflicts between the Congressional mandate and the obligations of a preexisting treaty?

## COUNTERSTATEMENT OF THE CASE

This case arises out of the continuing political controversy over the "Byrd Amendment," which was passed by Congress to end this nation's dependency upon the Soviet Union for metallurgical chromite by permitting the importation of that and other "strategic and critical" materials from Rhodesia, despite contrary resolutions of the United Nations Security Council.

Specifically, the Amendment, Section 503 of the Military Procurement Act of 1971, Pub. L. No. 92-156,

sought to remove chrome ore and other materials classified as "strategic and critical" under the provisions of the Strategic and Critical Materials Stock Piling Act, 50 U.S.C. §§ 98-98h, from the embargo placed upon Rhodesian imports by Executive Orders 11322 (Jan. 5, 1967) and 11419 (July 29, 1968). These orders had been issued by President Johnson under Section 5 of the United Nations Participation Act, 22 U.S.C. § 287c, in order to establish legally in this country the embargo of Rhodesian products voted by the Security Council in Resolutions 232 (Dec. 16, 1966) and 253 (May 29, 1968).[1]

The result of this embargo was to make the Soviet Union, the major world supplier after Rhodesia of metallurgical chromite, this country's main source of this "strategic and critical" material, which is not produced in the United States.

As is shown in greater detail in Addendum A, Senator Harry F. Byrd, Jr. of Virginia, concerned that this country must rely upon the Soviet Union for this critical defense-related material, introduced the legislation "to end this dependency [for chrome] upon the Soviet Union," the Security Council resolutions not-

[1] The Executive Orders delegated primary authority for implementation of the embargo to the Treasury Department, which issued regulations forbidding importation of Rhodesian materials without a license. Rhodesian Transaction Regulations, 31 C.F.R. Part 525 (1967). These were replaced in 1968 with the Rhodesian Sanctions Regulations, 31 C.F.R. Part 530, which continue in effect to the extent they do not conflict with the Byrd Amendment. Under the Regulations the Secretary of the Treasury delegated his authority under the Executive Orders to the Director of the Office of Foreign Assets Control. 31 C.F.R. § 530.807. The "General License" permitting imports of "strategic and critical" materials was an amendment to the Rhodesian Sanctions Regulations. 31 C.F.R. § 503.518.

withstanding. Senator Byrd explained that under his bill "the President could not ban imports of a strategic material from a free world country if the importation of the same material is permitted from a Communist-dominated country." 117 Cong. Rec. S 3994 (Mar. 29, 1971), Addendum A at 2a, 4a.

Opposition to the measure formed quickly, as others weighed the competing interests differently. In hearings on the bill, these opponents vigorously argued that it should be rejected, since, as Senator Byrd stated, its major purpose was to modify the Executive Orders in order to permit imports of metallurgical chromite from Rhodesia, in spite of the Security Council resolutions. *See, e.g., U.S. Sanctions Against Rhodesia—Chrome, Hearings on S. 1404 Before the Senate Committee on Foreign Relations,* 92d Cong., 1st Sess. at 2, 7-8, 14-15, 20, 77-78, 103-104; Addendum A at 5a-9a. After hearings, the Foreign Relations Committee did not report the bill out. However, the Armed Services Committee added provisions identical to the bill as Section 503 of H.R. 8687, the 1971 bill for military procurement. Addendum A at 9a.

Vigorous attempts to delete or weaken Section 503, supported by opponents' assertions that it was "specifically designed to have the United States unilaterally break the United Nations embargo against Rhodesia and to import chrome ore from that area" (Senator McGee), failed by narrow votes (Addendum A at 10a-13a), and the Senate-House conferees approved it virtually intact.[2] Addendum A at 15a.

---

[2] In deference to the House germaneness rule, Pub. L. No. 92-510, § 126, the conferees entitled Section 503 as an amendment to the Strategic and Critical Materials Stock Piling Act, 50 U.S.C. §§ 98-98h, a defense-related law, instead of the U.N. Participation Act. Addendum A at 15a.

Considering the Conference Committee's work, the House approved Section 503 on November 10, 1971 by a separate roll call vote of 251 to 100, despite petitioner Congressman Dellums' statement that the Byrd Amendment "would end the embargo on Rhodesian chrome." The Senate approved the Conference Report the next day on a 65-19 vote, the President signed the bill November 17, 1971, and by its terms the Byrd Amendment became effective on January 1, 1972. Addendum A at 19a-22a.

As enacted the Byrd Amendment reads:

> "SEC. 10. Notwithstanding any other provision of law, on and after January 1, 1972, the President may not prohibit or regulate the importation into the United States of any material determined to be strategic and critical pursuant to the provisions of this Act, if such material is the product of any foreign country or area not listed as a Communist-dominated country or area in general headnote 3(d) of the Tariff Schedules of the United States (19 U.S.C. 1202), for so long as the importation into the United States of material of that kind which is the product of such Communist-dominated countries or areas is not prohibited by any provision of law." Pub. L. No. 92-156, § 503.

On January 24, 1973 respondent Sommerfield, after being "informed by [his] superiors of instructions sent by the President to the Secretary of the Treasury directing the Treasury Department to take the necessary action to permit the importation of strategic and critical materials of Rhodesian origin, as called for by the Byrd Amendment" (Sommerfield Affidavit ¶2, reprinted *infra* at 23a as Appendix B), issued as an amendment to the Rhodesian Sanctions Regulations the

"General License" challenged by petitioners. 31 C.F.R. § 530.518, Pet. 27a-29a.

Following the issuance of the "General License" and the importation of chromite by respondent Union Carbide and by Foote Mineral Company, petitioners filed this case on April 19, 1972.

Petitioners sought an injunction forbidding the importation into this country of metallurgical chromite and other "strategic and critical" materials from Rhodesia (Amended Cplt. ¶ 1(a)), as well as an order directing the Government defendants to impound the metallurgical chromite already imported by private parties in reliance upon the Byrd Amendment (Amended Cplt. ¶ 1(b)), and a declaratory judgment that the statute did not authorize imports from Rhodesia, or that, if it did, it "is itself null and void." Amended Cplt. ¶ 1(c).

After denying petitioners' motions for a temporary restraining order and a preliminary injunction, the District Court issued an opinion granting respondents' motions to dismiss on June 19, 1972. The District Court held that the case was not justiciable since it presented political questions which, in any event, petitioners lacked standing to raise. Pet. 37a, 44a. The court also found that petitioners' complaint failed to state a claim upon which relief could be granted, since Congress in passing the Byrd Amendment exercised its "Constitutional authority to abrogate, in whole or in part," any treaty obligations that might prevent "the importation into this country of Rhodesian goods classified as strategic if these same goods were imported from a communist dominated country." Pet. 45a-46a.

The Court of Appeals unanimously upheld Judge Robinson's order dismissing the case. It agreed the

case was not justiciable, although it found that some petitioners had "standing" in a formal sense. Pet. 50a, n. 1. Holding that "there can be no blinking the purpose and effect of the Byrd Amendment" to undercut United States adherence to the "U.N. boycott of Southern Rhodesia," the Court of Appeals saw no basis to void the legislation or interpret it contrary to its manifest intent. Pet. 53a-55a.

Nor was the Court impressed by petitioners' claim that since the President *could* continue the Rhodesian embargo in full force by two suggested alternatives, one of which was banning chrome imports from all Communist countries, including the Soviet Union, he was *required* to do so. Its opinion stated:

> "The so-called options given to the President are, in reality, not options at all. In any event, they are in neither case alternatives which are appropriately to be forced upon him by a court." Pet. 55a (footnote omitted).

The political controversy surrounding the Byrd Amendment has continued during the pendency of this litigation, with both the House and the Senate rejecting proposals to repeal or weaken it. 118 Cong. Rec. S 8613 (May 31, 1972), H 7508-14 (Aug. 10, 1972).

## ARGUMENT IN OPPOSITION TO CERTIORARI

The Byrd Amendment to the Strategic and Critical Materials Stock Piling Act flatly provides that "the President *may not prohibit or regulate* the *importation* into the United States of *any material determined to be strategic and critical* . . . if such material is the *product of any foreign country or area not listed as a Communist-dominated country* or area . . . for *so long as the importation into the United States of material*

*of that kind* which is the *product of such Communist-dominated countries* or areas is *not prohibited by any provision of law"* (emphasis added).

It is undisputed that metallurgical chromite is designated a strategic and critical material under the Strategic and Critical Materials Act. It is equally undisputed that importation of chrome from Communist-dominated countries, since not prohibited by law, continues. Finally, no one disputes that Rhodesia is not listed as a Communist-dominated country or area.

Given these facts, both courts below recognized that the Byrd Amendment expressly prohibits Presidential interference with importation of metallurgical chromite and other "strategic and critical" materials from Rhodesia and fully supports issuance of the so-called "General License" permitting such importation.

Petitioners' attacks upon the implementation of the Byrd Amendment are founded totally upon alleged conflict between the express Congressional mandate and preexisting obligations incurred by the United States under the United Nations charter. Petitioners contend that these obligations permit the courts either:

(a) to enjoin implementation of the Congressional will; or

(b) to create the preconditions for a ban on Rhodesian chrome imports by reversing the Executive Branch's determination that chrome is a "strategic and critical" material, under the Strategic and Critical Materials Act, or by forcing the President to bar importation of chrome from Communist-dominated countries, under the Trading with the Enemy Act.